

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CUMBERLAND RESOURCES CORPORATION¹/₂

Employer

and

Case No. 11-RC-6452

UNITED MINE WORKERS OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 2/

All production and maintenance employees employed at the Employer's Fork Ridge, Bluff Spur, Meadow Branch, and Mill Branch facilities located in Wise County, Virginia, excluding office clerical employees, independent truckers, section foremen, and guards, professional employees and all other supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

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engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

United Mine Workers of America

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office of the National Labor Relations Board, Region 11, 4035 University Parkway, Suite 200, P. O. Box 11467, Winston-Salem, North Carolina 27116-1467, on or before August 10, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by August 17, 2001.

Dated August 3, 2001

At Winston-Salem, North Carolina

/s/Patricia L. Timmins
Acting Acting Regional Director, Region 11

1/ The name of the Employer, Cumberland Resources Corporation (“Cumberland”), appears as amended at the hearing. The term “Employer” herein refers to Cumberland and its four mining subsidiaries: Mill Branch Mining Corporation (“Mill Branch”), Fork Ridge Coal Corporation (“Fork Ridge”), Bluff Spur Coal Corporation (“Bluff Spur”), and Meadow Branch Coal Corporation (“Meadow Branch”), collectively referred to as “mines.”

2/ Cumberland Resources Corporation, a Virginia corporation, is a holding Company, with an office located in Norton, Virginia, which provides management services to its subsidiary corporations, including Mill Branch, Fork Ridge, Bluff Spur, and Meadow Branch. Those subsidiaries are all located in Wise County, Virginia, and are engaged in the business of mining, loading, and transportation of coal. During the preceding twelve (12) months, Cumberland, in the course and conduct of its business operations, derived revenues in excess of \$50,000.00 directly from the above-named subsidiary corporations. Each of the four subsidiary corporations purchased and received goods and materials valued in excess of \$50,000.00 directly from points outside the Commonwealth of Virginia.

The Employer and United Mine Workers of America (“the Petitioner”) filed briefs which have been carefully considered. The Petitioner seeks a unit of all production and maintenance employees at the four mines identified above. There are two issues. The Petitioner contends that Cumberland and its four mining subsidiaries constitute a single employer and that a unit comprised of employees from Mill Branch, Fork Ridge, Bluff Spur and Meadow Branch constitutes an appropriate unit. The Employer argues that Cumberland and its four mining subsidiaries do not constitute a single employer and that the only appropriate unit is four separate units. The Petitioner also contends that the section foremen employed at each of the four mines are supervisors, whereas the Employer asserts that they are rank-and-file employees.

In determining whether nominally-separate entities, in this case Cumberland and its four mining subsidiaries, constitute a single employer, the Board looks to the following factors: “common ownership, common management, interrelations of operations, and common control of labor relations.” Mercy General Health Partners Amicare Homecare, 331 NLRB No. 93 slip op. at 2 (2000). “[S]ingle employer status depends on all the circumstances and is characterized by the absence of the arm’s length relationship found between unintegrated companies.” Id. Although the Board generally considers the most crucial factor to be centralized control over labor relations, no specific factor is controlling, and all do not have to be present. Id.

Here, Cumberland, the parent or holding company, provides management services to each of the four mines pursuant to contract as follows: “cost, budget, wage and salary administration, business and information systems, supervision and administration of the work force, technical, safety, and environmental issues.” Cumberland employs ten persons, none of whom are petitioned-for unit employees.

Cumberland has a subsidiary named Alliance that has a contract-mining agreement with Mill Branch to mine its coal. Meadow Branch LLC, an unrelated company, contracts with the three remaining subsidiaries at issue, Fork Ridge, Bluff Spur, and Meadow Branch, to mine its coal.

Cumberland also has another subsidiary, Mountain Management, which contracts with Cumberland to provide management services including “cost, budget, wage and salary administration, business and information systems, supervision and administration of the work force, technical, safety, and environmental issues.” I note that this is the same terminology used, as shown above, in the contracts between Cumberland and each of the four mines. The four mines provide their production figures to Mountain Management, which, among other things, coordinates coal production to the customers of Alliance and Meadow Branch, LLC.

Each of the four mines has a superintendent as follows: Mill Branch, Gail Kiser; Fork Ridge, Hagy (“Bear”) Barnett ; Bluff Spur, Mike Sanders; and Meadow Branch, Frank Bowman.¹ Mill Branch, Fork Ridge, and Meadow Branch all have three shifts; two run production and one is deadwork, which is non-production. Bluff Spur presently has one production and one deadwork shift and is considering, but has no concrete plans for, a third shift. The number of section foremen at each mine (more fully discussed below) is as follows: six at Mill Branch (two on each shift); three each at Fork Ridge and Meadow Branch (one on each shift), and two at Bluff Spur (one on each shift). Excluding section foremen, there are 56 employees at Mill Branch; 35 at Fork Ridge; 25 at Bluff Spur; and 35 at Meadow Branch.

With respect to the single-employer issue, there is no doubt regarding the issue of common ownership as Cumberland is the sole owner of the four mines. The first prong of the single-employer analysis, therefore, is satisfied.

The record further shows common management, interrelation of operations, and common control of labor relations. In regard to common management, Cumberland, Alliance, Mountain Management, and the mines share common corporate officers. Richard Gilliam is the president of Cumberland. Ed Bolton is the Chief Financial Officer and a Vice President of Cumberland. Marvin Gilliam is also a Vice President of Cumberland. The President of Mountain Management is Robert Stallard; Gail Kiser is a Vice President. Additionally, Ed Bolton and Marvin Gilliam are Vice Presidents and Assistant Secretaries of Mountain Management. For each of the mining corporations, Richard Gilliam is President, Ed Bolton and Marvin Gilliam are Vice Presidents, and Ed Bolton and Marvin Gilliam are Assistant Secretaries. Stallard is the Vice President of Operations at Meadow Branch and Fork Ridge. The corporate officers for Alliance are the same as those of the four mining corporations. Richard Gilliam, Ed Bolton, and Marvin Gilliam are the only persons authorized to sign checks for the mines.

In addition to common officers, the record reflects additional evidence of common management beyond the local level as well as interrelatedness of operations. To be sure, the superintendents exercise some independence in day-to-day management and labor relations, such as determining the method of mining, selecting the equipment involved, hiring and firing employees, and selecting contractors and vendors. The evidence shows, however, that Cumberland directly, and through its subsidiary, Mountain Management, also exercise

¹ In considering testimony on the issues, I note that admitted supervisors, Superintendents Bowman, Sanders, and Barnett indicated that their testimony would be the same as Superintendent Kiser, unless they testified differently on a particular subject.

significant control over the four mines. In that regard, Mountain Management, is not only owned by Cumberland, but, by virtue of its management services contract with Cumberland, acts as an agent of Cumberland. Thus, in some respects, Superintendent Kiser, who is employed by Mountain Management as a Vice President, appears to act as a super-superintendent. In addition to his responsibilities at Mill Branch, where he is superintendent, he is frequently consulted in person and by telephone about mining conditions by the superintendents of the other three mines. The evidence establishes that, although there are areas in which the various superintendents make the ultimate decision, Kiser and the respective superintendents may make joint decisions in regard to safety matters. Kiser's managerial role extends beyond his consulting role. In this respect, for example, Kiser hired Mike Sanders to be the superintendent at Bluff Spur.

Robert Stallard, the President of Mountain Management, receives the production figures from the four mines on a frequent basis so that he can schedule shipments. Thus, Stallard calls Superintendent Bowman every morning to check on the work performed and to see if there are any problems. In addition, at least one of the mines' superintendents sends production figures to Cumberland on a daily basis. In conjunction with his duties, Stallard also visits the mines. Stallard and the superintendents also establish production goals and set the amounts of coal production bonuses which employees receive if they meet their production goals. The record shows that Stallard's role goes beyond that of production/sales coordinator. Thus, Stallard selected Kiser to run Mill Branch. More significant is the fact that Stallard recently approved a raise at all four of the mines, thereby creating uniform wage rates. The four superintendents had approached Stallard because they were concerned that they were losing employees and felt that they could not attract new employees. This was not an isolated instance of Stallard's involvement in the raise process, as the record established that raises at Mill Branch in the past have been a joint decision between Stallard and the superintendent.

The record also shows that Tom Asbury, another employee of Mountain Management, assists all four superintendents on issues concerning federal and state safety regulations. Asbury has also conducted a safety meeting at Bluff Spur.

In addition to the interrelatedness of operations already shown, the record reveals that there are occasional loans of equipment and frequent interchange of equipment parts among the mines. There has also been some employee interchange among the mines. Thus, the record shows several instances of temporary transfers, including vacation and illness coverage, and when employees worked at another mine for periods of time ranging from days to months before returning to their original mines. The record additionally shows several instances of permanent transfers. Employees do not lose their accrued benefits or vacation when they transfer. Further, there has been at least one instance of joint training for the employees of Fork Ridge and Bluff Spur. There is also some evidence of supervisory transfer. Thus, Mike Sanders, the present superintendent at Bluff Spur was previously a section foreman at Mill Branch. Mike McConnell from Mill Branch has twice moved from Mill Branch to Bluff Spur and appears to have temporarily assumed section foremen duties on at least one of those occasions.

With respect to centralized labor relations, the record establishes that Richard Gilliam is the President of Cumberland and the mines; Martin Gilliam and Ed Bolton are the Vice

Presidents of Cumberland and the mines. The ultimate authority for all decisions pertaining to both Cumberland and the mines, therefore, rests with the same officials. In the single-employer context, the Board has noted that whether day-to-day labor relations are handled at the local level is not dispositive, as the “more critical test is whether the controlling company possessed the present and apparent means [as here] to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.” Pathology Institute, Inc., 320 NLRB 1050, 1050 n.1 & 1063 (1996), enforced mem. sub nom. Alta Bates Corp. v. NLRB, 116 F.3d 482 (9th Cir.), cert. denied, 522 U.S. 1028 (1997) (quoting Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1043 (8th Cir. 1976)).

The record simply does not support the contention that the superintendents independently control all aspects of labor relations at their respective facilities. Wage levels or raises have previously been discussed. With respect to hire, employees either fill out a standard application at Cumberland’s office without designating any particular mine, or go directly to the particular mine and talk to the superintendent. Cumberland handles the regular payroll for the mines, as well as the payroll for coal production bonuses. Cumberland provides the same health insurance, 401(k) plan, and life insurance to the mines’ employees.² Employees at all the facilities have the same vacation benefits. All four mines have the same 60-day probation period and during that time employees do not receive holiday pay or health care benefits. Finally, I note that Richard Gilliam, the President of Cumberland, wrote a memorandum regarding the Union’s petition addressed to “Mine Superintendents, Mine Management Teams and all Employees of Cumberland Resource Corporation,” which was distributed to all of the mines’ employees.

On the basis of the foregoing, I find common ownership, common management, integration of operations, and centralized control of labor relations, and, accordingly, I conclude that Cumberland and its four mining subsidiaries constitute a single employer.

That does not end the inquiry, however, because a finding of single employer does not in itself mean that an overall unit is appropriate. See Edenwald Construction Co., 294 NLRB 297, 297 (1989). In making unit determinations, the Board’s task is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit, or most appropriate unit. Harron Communications, 308 NLRB 62, 63 (1992). The starting point in making this determination is to examine the unit sought by the Petitioner. Dezcon, Inc., 295 NLRB 109, 111 (1989). If the Petitioner’s choice of unit is appropriate, the inquiry ends. Id. In determining whether a multi-facility unit, as here, is appropriate, the Board looks at many of the same factors considered in the single-employer analysis: “employees’ skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history.” Alamo Rent-a-Car, 330 NLRB No. 147, slip op. at 1 (2000).

Here there is no bargaining history. As shown above, there is centralized control of management and supervision, as well as functional integration, as demonstrated by the mines’ production of the coal and Mountain Management’s coordination of its sale. Although each superintendent acts autonomously in some respects, in other respects, the employees are subject to higher-level control emanating from Mountain Management and Cumberland. I note also that

² Cumberland also prepares financial statements and a consolidated income tax return for all four mines.

the employees have similar skills and duties, as they occupy the same positions at each of the mines, the mines are similarly organized with respect to a multi-shift structure headed by section foremen, and the employees enjoy the same wages and benefits. The mines have close geographic proximity. Thus, Mill Branch is approximately 8.4 miles from the other three mines which are within one and one-half miles of one another. Weighing against the appropriateness of a multi-facility unit is the fact that there has been limited employee interchange in the form of temporary or permanent transfers, and otherwise there is very little day-to-day contact, unless for example, employees happened to be outside the mine performing some function and employees from other mines brought parts by at that time. Notwithstanding that factor, I conclude that there is a sufficient community of interest between the employees of the four mines such that a multi-facility unit is appropriate. See Numrich Arms Corporation, 237 NLRB 313 (1978) (two-facility unit of single employer appropriate despite dissimilar work and infrequent interchange).

The Petitioner also contends that section foremen who are also called section bosses, shift bosses, shift foremen, foremen, and crew leaders, are supervisors and should be excluded from the unit. The Employer argues that section foremen are nonsupervisory employees who should be included in the unit.

Section 2(11) of the Act provides:

The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-settled that supervisory status is conferred by the possession of any one of those primary indicia. Baby Watson Cheesecake, Inc., 320 NLRB 779, 783 (1996). Moreover, given the presence of at least one primary indicium, secondary indicia may inform the analysis of supervisory status. Id. at 784.

The record shows that the 14 section foremen³ who work at the four mines report directly to the mines’ superintendents. Depending on the mine, each section foreman is in charge of a crew of as few as 8 persons or as many as 17. Section foremen are in charge of their section and/or shift and are entrusted with keeping the employees safe. As part of their duties in ensuring that their mines are safe, section foremen must be certified mine foremen, as they normally perform “fireboss” duties on their shift, a safety inspection function which involves examining ventilation and checking methane levels. In performing their fireboss duties, section foremen carry special equipment not carried by other employees. In addition, section foremen carry a mine map and bear the responsibility to read the map to determine the direction that the

³ The foremen are as follows: at Mill Branch, Floyd Barnett, Tommy Childress, Michael Morgan, Jesse Ring, Lenton Silcox, and Roy Bedwell; at Fork Ridge, Craig Short, James Boggs, and Freel Mullins; at Bluff Spur, Teddy Starnes and Jim Barker; and at Meadow Branch, David Atkins, Thomas Davidson, and John Gilley.

coal is to be mined. In that regard, section foremen usually paint “center lines” in order to insure that the employees are directed to the proper work area.

Contrary to the Employer’s argument, in performing their duties, section foremen are not merely conduits for carrying out their superintendents’ instructions. Nor are section foremen simply skilled employees guiding less experienced employees. In this regard, the record establishes that in determining work priorities and instructing employees in what to do, section foremen are empowered to do “whatever is necessary” to get the work finished, and are responsible for ensuring that the work assigned to their shifts is completed. In accomplishing that objective, section foremen necessarily use discretion and exercise independent judgment. Thus, section foremen adjust work assignments by moving employees to various tasks as necessary. The record shows that employees especially look to section foremen for direction when they are on the deadwork shift, on which employees perform lots of different jobs, during equipment breakdowns, when employees are temporarily caught up with their work, or when the crew is short-handed. In the course of directing employees, section foremen authorize overtime, permit employees to leave early,⁴ schedule breaks, take care of equipment breakdowns, and assist injured employees. Section foremen also conduct firedrills and safety meetings. In addition, section foremen maintain numerous records including recording mining conditions in the pre-shift mine examination book, and maintaining firedrill records, production reports, time sheets, and accident reports. Although the evidence shows that the superintendents are on-call virtually 24 hours a day and available for consultation, at Mill Branch, Kiser only got called once a week concerning a breakdown or equipment part. In sum, as shown, it is clear on this record that section foremen “responsibly direct,” in the sense that they are charged with seeing that the jobs on the entire shift are completed. See generally KOFY, Operator of KOFY TV-20, 332 NLRB No. 67, slip op. JD at 19 (2000) (employee is a statutory supervisor where he or she is held “fully accountable and responsible for the performance and work product of the employee he or she directs”). Although there is contradictory evidence in the record concerning the amount of production work that the section foremen perform themselves, that factor is irrelevant to the foregoing analysis, as I find that section foremen coordinate and oversee the employees who are entrusted to them and, in so doing, responsibly direct them.

The evidence further shows that, unlike other employees, section foremen have a role in maintaining order and discipline in the mines. For example, the record demonstrates that in one case a superintendent instructed one of his section foreman to talk to an employee about his absenteeism. In other instances, the record showed that section foremen were present during disciplinary meetings or reported incidents to superintendents which they considered to be employee infractions. Thus, in one situation a foreman broke up an altercation between two employees and reported the incident to the superintendent who ultimately determined that further discipline was not necessary after meeting with the foreman and the two employees who were

⁴ At Mill Branch, the section foremen have the authority to let production employees go home early, whereas it is not clear whether foremen have that authority at other mines. At Fork Ridge, the superintendent retains authority to let employees off, but that appears to be in connection with requests to come in late or take entire days off. Similarly, at Meadow Branch, the superintendent retains authority to let employees off but that appears to be in connection with approving sickness or emergency leave. At Bluff Spur, if an employee calls in sick, the superintendent expects the foreman on duty to relay the message to him.

involved. In another case, a section foreman threatened to get rid of an employee, and the next day the employee was fired. In another instance, a foreman told an employee that he better not be late anymore or he would not be coming back. Further, a section foreman has authority to fire an employee if the employee presents a danger to other employees or himself.

In addition, abundant secondary criteria bolster the primary criterion found above. Although section foremen are paid hourly and receive overtime after 40 hours per week as do production employees, they are the highest-paid employees except for superintendents and make between \$.75 to \$3.50 more per hour than the other employees on their shift. In addition, the employees consider them to be supervisors, the Employer has held them out to be supervisors, and they are regularly the highest-ranking individuals at the mines. Moreover, it is significant that if section foremen are not supervisors, employees are regularly unsupervised for substantial periods of time each day. In that regard, I note that three of the mines operate 24 hours a day. Finally, if section foremen are not supervisors, the extremely low supervisor/employee ratios of 1:62, 1:38, 1:27, and 1:38 at Mill Branch, Fork Ridge, Bluff Spur, and Meadow Branch, respectively, are improbable. While the Employer contends that when superintendents are absent from Fork Ridge and Meadow Branch, messages are relayed to them by employees other than the section foremen, this factor does not negate the supervisory authority exercised by the section foremen.

In sum, I conclude that section foremen are supervisors as defined in the Act and, therefore, I shall exclude them from the unit found appropriate herein.

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